Supreme Court, U.S.
FILED
JUL 10 1996
OFFICE OF THE CLERK

No. 96 70

In The

Supreme Court of the United States

October Term, 1995

COLUMBIA MACHINE, INC.,

Petitioner,

vs.

HERMAN E. SCHNIDRIG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN R. POTTER
Counsel of Record
HEURLIN & POTTER, P.S.
610 Esther Street
Suite 225
P.O. Box 611
Vancouver, Washington 98666-0611
Telephone: (360) 750-7547

WALTER W. CHRISTY
KULLMAN, INMAN, BEE,
DOWNING & BANTA
A Professional Corporation
1600 Energy Centre
1100 Poydras Street
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pgs

QUESTION PRESENTED

1. Whether the Ninth Circuit Court of Appeals created a new standard for the granting of a summary judgment motion in an employment discrimination case that conflicts with the Supreme Court decision in *Celotex*, as well as numerous circuit court of appeal decisions, by holding that evidence of discriminatory remarks, regardless of their connection to the employment decision, necessarily creates a genuine issue of fact.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

INDEX TO APPENDICES ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATUTE INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The Ninth Circuit's Opinion Directly Conflicts with the Supreme Court's Ruling in *Celotex* and Several Other Circuit Court of Appeal Decisions Concerning the Treatment of Direct Evidence of Discrimination 7

CONCLUSION 12

INDEX TO APPENDICES

Appendix A. Opinion of the Ninth Circuit Court of Appeals A-1

TABLE OF AUTHORITIES

Page

Armbruster v. Unisys Corp., 65 FEP 828 (3rd Cir. 1994)..... 8, 10, 11

Celotex v. Catrett, 477 U.S. 317 (1986)..... 7, 8

Mauter v. The Hardy Corporation, 825 F.2d 1554 (11th Cir. 1987)..... 8, 9

Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986)..... 8

Ostrowski v. Atlantic Mutual Insurance Company, 968 F.2d 171 (2d Cir. 1992) 11

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 8

Radabaugh v. Zip Feed Mills, 62 FEP 438 (8th Cir. 1993)..... 8, 11

Shager v. Upjohn, 913 F.2d 398 (7th Cir. 1990)..... 10

Weisbrot v. Medical College of Wisconsin, 70 FEP 763 (7th Cir. 1996)..... 8, 10

PETITION FOR WRIT OF CERTIORARI

Columbia Machine, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 11, 1996, in order to resolve the conflict between the Ninth Circuit Court of Appeals and the Supreme Court and several other Circuit Courts of Appeal on the important issue presented herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, which is reported, appears in Appendix A.

JURISDICTION

The Ninth Circuit entered its opinion and judgment on April 11, 1996. Petitioner filed its Petition for Writ of Certiorari within ninety days of the Notice of Entry of Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, *et. seq.*, provides that it is unlawful for an

employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age." § 623(a)(1).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

This case arises from the decision by Columbia Machine, Inc. ("Columbia") to hire someone other than Plaintiff, Herman E. Schnidrig ("Schnidrig"), as President of the Company. Schnidrig asserts that Columbia refused to offer him the position of president because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). At the time of his application, Schnidrig was acting as the general manager and vice president of operations for Columbia.

After filing his original complaint, Plaintiff resigned and filed an amended complaint asserting a claim for wrongful constructive discharge because of his age and in retaliation for his complaint about perceived age discrimination.

On March 12, 1993, Columbia moved for summary judgment on all claims. By order dated August 10, 1993, the U. S. District Court for the District of Oregon granted Columbia's motion. In doing so, the District Court concluded there was no evidence that the decision-maker, an individual employed by an executive search firm, considered age in selecting candidates for the position of president. (Schnidrig was not among the candidates selected

due to his inferior qualifications.) Furthermore, the District Court found that comments made by members of the Board of Directors of the Company alleged to have been direct evidence of discrimination were "stray remarks" with no connection to the employment decision.

An appeal from the decision of the District Court was filed by Schnidrig, with the Equal Employment Opportunity Commission appearing by amicus brief on behalf of the Plaintiff. The Ninth Circuit Court of Appeals reversed the District Court's granting of summary judgment on the claim of age discrimination and affirmed the District Court's dismissal of Schnidrig's claim of constructive discharge. In reversing the District Court on the age discrimination claim, the Ninth Circuit relied upon allegations of direct evidence of discrimination that were in no way attributed to the decision-maker. The Court of Appeals concluded that the allegations themselves, without determining their relationship to the decision-maker, were sufficient to overcome Columbia's motion for summary judgment. Columbia has filed this Petition for Writ of Certiorari on the basis that the Ninth Circuit's approach is in conflict with other Circuit Courts of Appeals, as well as well-settled Supreme Court precedent.

B. Statement of the Facts

For the purposes of this petition, the facts as set forth by the Court of Appeals in its opinion are taken as true. See Appendix A. Those facts pertinent to the petition are as follows:

Columbia is a closely held Washington Corporation owned by the Neth family. Fred Neth, Sr., is the majority shareholder, chairman of the Board of Directors, and chief executive officer of Columbia. The Board consisted of six directors: Fred Neth, Sr.; three of his children, Fred Neth Jr., Dorothy Osadchuk, and one other daughter, Bill Wells, a long time employee; and Joe Barclay, president of the Cascade Corporation.

Schnidrig, who was born in 1930, began working for Columbia as a production manager in 1980. In 1981, he was promoted to vice-president of manufacturing. In February of 1991, the president of the company, Tom Neth, resigned under pressure. Schnidrig was asked to take over the responsibilities of Tom Neth and run the company as general manager/vice-president of operations while the Board searched for a new president.

Schnidrig alleges, and we accept as true for purposes of summary judgment, that as early as June of 1991, Bill Wells told Schnidrig that during a Board of Directors meeting, Joe Barclay voiced the opinion that Columbia needed a president in the 45-50 year old range and that other directors agreed. In addition, the affidavit of Robert Showman, the manager of cost accounting, states that in the Fall of 1991, Bill Wells told him the Board was not considering Schnidrig because they wanted someone in his or her mid to late forties. Schnidrig also presented the shorthand notes of the minutes of a Board meeting held on February 25, 1992. The notes indicate during discussion regarding the preparation of materials to be sent to the executive search firm, Joe Barclay stated "they should

send a copy of job description, maximum compensation level, only perk, company car, age 45-50 years, and past experience with long-term potential." Bill Wells omitted the reference to an age requirement from the final draft of the minutes.

On February 12, 1992, Schnidrig sent a memo to Fred Neth, Sr. indicating he was interested in the president's position. Schnidrig alleges that on February 19, Fred Neth, Sr. told him Joe Barclay wanted a younger man for the job and that his daughters were leaning that way as well. Schnidrig also alleges that on February 27, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president.

In March of 1992, the Board hired Ronald Goerss of the recruiting firm Smith, Goerss, & Ferneborg, to conduct a nationwide search for a new president and to present candidates for the position to the Board. The Board agreed the president would be selected from the candidates submitted by Goerss. The Board gave Goerss a list of six minimum qualification requirements for the position. The list included four general requirements: 1) strong work ethic; 2) warm, friendly personality; 3) effective communication skills; and 4) team leadership. In addition, the list contained two specific requirements:

> (1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a larger firm engaged in the design, manufacture and sale of industrial machinery and equipment; and

> (2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

Goerss indicated he relied solely on the criteria given him by the Board and that he was never instructed to, nor did he consider age in making his decisions.

Schnidrig alleges that on May 8, he again asked Fred Neth, Sr. why he could not be president of Columbia and was again told the Board was looking for somebody younger.

In June of 1992, Goerss completed his search, including interviews of all three Columbia vice-presidents, and submitted a list of five candidates to the Board. All five candidates were from outside the company. The Board interviewed two of the five candidates and, in July, entered into negotiations with Gerald O'Meara to be the president of Columbia.

Also in July, Schnidrig again applied for the position of president and alleges he was again told the Board was looking for somebody younger in the 45-50 year old range. Thereafter, Schnidrig filed his first complaint with the EEOC.

On October 8, 1992, O'Meara accepted Columbia's offer and agreed to begin work on November 2, 1992. Schnidrig resigned on October 27, 1992.

Schnidrig filed suit against Columbia claiming that he was denied the promotion to president because of his age, and that he was constructively discharged in retaliation for filing a complaint with the EEOC. The district court

granted summary judgment in favor of Columbia on all claims.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Opinion Directly Conflicts with the Supreme Court's Ruling in *Celotex* and Several Other Circuit Court of Appeal Decisions Concerning the Treatment of Direct Evidence of Discrimination

The Ninth Circuit proclaimed that it requires very little evidence to survive summary judgment in an employment discrimination case and closed the door on Columbia's motion by finding that alleged comments made by members of the Board of Directors of the Company and particularly Fred Neth, Sr., created an issue of fact. According to the Ninth Circuit's opinion, the District Court erred in granting Columbia's summary judgment motion because it "prematurely" resolved the issue of whether the Board member's comments had been sufficiently insulated from the decision-making process. Appendix A-11. The Ninth Circuit effectively ruled that where an individual has alleged direct or circumstantial evidence of discrimination, summary judgment is necessarily defeated and the question of the relationship of the evidence to the decision-making process should go to the jury.

The Ninth Circuit approach is at odds with the Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317 (1986), and numerous Circuit Court decisions. In *Celotex*, the Supreme Court held that summary judgment is appropriate where "the pleadings, depositions, answers

to interrogatories, and admissions on file, together with affidavits, if any, say that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 322-23. In responding to a motion for summary judgment, it is incumbent upon a plaintiff to come forward with evidence sufficient to show the existence of a genuine issue regarding a material fact. *Id.* Where direct evidence of employment discrimination has been alleged, it is well-settled that the relationship between the remark and the decisional process is a material fact.[1] *Weisbrot v. Medical College of Wisconsin*, 70 FEP 763, 769 (7th Cir. 1996); *Armbruster v. Unisys Corp.*, 65 FEP 828 (3rd Cir. 1994); *Radabaugh v. Zip Feed Mills*, 62 FEP 438 (8th Cir. 1993) and *Mauter v. The Hardy Corporation*, 825 F.2d 1554 (11th Cir. 1987). Nevertheless, the Ninth Circuit rejected this established principle and, instead, created a new standard that requires plaintiffs to simply allege the existence of discriminatory remarks without considering whether they are material to the decision-making process.

---

[1] Justice O'Conner commented as follows with respect to discriminatory remarks:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-69, 91 L.Ed.2d 49, 106 S.Ct. 2399 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecision-makers, or statements by decision-makers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989).

The Eleventh Circuit Court of Appeal utilizes a different approach to considering direct evidence of discrimination presented by a plaintiff in response to a motion for summary judgment. In *Mauter, supra,* a 60-year-old plumber estimator was terminated when his employer ceased operations of the department for which he worked. In response to Mauter's lawsuit, The Hardy Corporation ("THC") filed a motion for summary judgment offering significant economic reasons for closing the plumbing department. Rather than disputing the articulated explanation for his dismissal, Mauter chose to present direct evidence of discrimination by alleging that a vice president of THC (who retired during the year Mauter was terminated) indicated he had grounds for the lawsuit because "The Hardy Corporation was going to weed out all of the old ones." *Id.* at 1558.

Although Mauter's allegation may have been sufficient to overcome a summary judgment motion according to the Ninth Circuit opinion herein, the Eleventh Circuit affirmed the granting of summary judgment because there was no evidence submitted to establish that the vice president played any part in the decision to terminate the plaintiff. Accordingly, the Eleventh Circuit held that the "plaintiff did not controvert the defendant's proof by setting forth specific facts showing that there is a genuine issue whether age was a substantial factor in THC's decision." *Id.* at 1558.

Similarly, Schnidrig chose to offer direct evidence of discriminatory motives in the form of statements made by Directors and notes taken during Board meetings. Schnidrig did not challenge Columbia's assertions that Gerald O'Meara was more qualified for the job, nor did

Schnidrig prove that he had possessed the requisite qualifications for the job. Despite Schnidrig's sole reliance on the alleged remarks and notes, he presented no evidence to establish that Ronald Goerss of the executive search firm was ever told to consider age or that he considered age in selecting the candidates. In the Eleventh Circuit, Schnidrig's failure to submit evidence raising a genuine issue regarding the decision-maker's motives would result in a dismissal of his case, yet according to the Ninth Circuit, such an analysis is premature and should be left to the jury.

The Ninth Circuit's approach is also in conflict with the Seventh Circuit's decision in *Weisbrot v. Medical College of Wisconsin, supra,* and the Third Circuit Court of Appeal in *Armbruster v. Unisys Corp., supra.* In *Weisbrot,* the Seventh Circuit succinctly stated:

> A slur is not in and of itself proof of actionable discrimination, even if repeated. The remark taken to be a slur may have been innocent or misunderstood, or it may have had no consequence, either because it did not reflect the thinking of the people with decision-making authority or because it did not motivate even the person uttering it to act on it.

Id. at 769, quoting *Shager v. Upjohn,* 913 F.2d 398 (7th Cir. 1990) (noting that "the favorable connotations that cluster around the term 'young men' are too tepid to create, in themselves, a triable issue of age discrimination"). In *Armbruster,* the Third Circuit refused to consider an official's statement that the company could not afford to keep employees over 50-years-old who were earning over $50,000 per year as direct evidence of discrimination

where there was no evidence connecting the official's statement to any decision-maker involved with the plaintiff's termination. *Armbruster*, 65 FEP at 836. *See also, Radabaugh v. Zip Feed Mills, supra,* (the plaintiff must present "evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the fact-finder to infer that that attitude was more likely than not a motivating factor in the employer's decision." *Id.* at 441, quoting *Ostrowski v. Atlantic Mutual Insurance Company*, 968 F.2d 171, 182 (2d Cir. 1992).

The Ninth Circuit's ruling creates an unfair burden for employers. An employee who is unhappy with a management decision affecting his or her employment can require an employer to incur the substantial expense of trial and face the possibility of an adverse jury verdict simply by filing a discrimination lawsuit against his employer and alleging statements were made that show management's intent to discriminate. According to the Ninth Circuit, an employee may do this regardless of how meritorious and non-discriminatory the employer's reasons for the decision were. There will be no procedure in the Ninth Circuit to dismiss ungrounded claims of discrimination short of trial where an employer makes a decision affecting his or her employees based entirely on merit or other non-pretextual reasons. Considering the increasing number of employment discrimination lawsuits being brought in the courts of this country, this conflict among the Circuit Courts of Appeals needs to be resolved.

CONCLUSION

The Ninth Circuit's decision has created a conflict among the circuits regarding an essential element of proof a plaintiff must establish in order to proceed with a case of employment discrimination. Petitioner has located no other decision of a Circuit Court of Appeal holding that it is premature to consider the relationship between alleged discriminatory remarks and the decisional process at the summary judgment stage of litigation. Accordingly, it is respectfully requested that the Petition for Writ of Certiorari be granted and the split in the circuits regarding "stray remarks" be resolved.

Respectfully submitted,

JOHN R. POTTER
Counsel of Record
HEURLIN & POTTER, P.S.
610 Esther Street
Suite 225
P.O. Box 611
Vancouver, Washington 98666-0611
Telephone: (360) 750-7547

WALTER W. CHRISTY
KULLMAN, INMAN, BEE,
DOWNING & BANTA
A Professional Corporation
1600 Energy Centre
1100 Poydras Street
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: (504) 524-4162

Attorneys for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERMAN E. SCHNIDRIG, *Plaintiff-Appellant,* v. COLUMBIA MACHINE, INC. a Washington corporation, *Defendant-Appellee.*	No. 93-35770 D.C. No. CV-92-001304-MFM **OPINION**

Appeal from the United States District Court
for the District of Oregon
Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
January 12, 1995 – Portland, Oregon
Submission Vacated January 23, 1995
Resubmitted April 4, 1996

Filed April 11, 1996

Before: Harry Pregerson and Stephen S. Trott,
Circuit Judges, and James M. Fitzgerald,* District Judge.

Opinion by Judge Trott

---

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

COUNSEL

Glenn N. Solomon, Portland, Oregon, for the plaintiff-appellant.

John R. Potter, Lee A. Knottnerus, Horenstein & Duggan, Vancouver, Washington, for the defendant-appellee.

Joseph Posner, Encino, California, for National Employment Lawyers Association, amicus curiae.

Robert K. Udziela, Pozzi, Wilson, Atchison, O'Leary & Conboy, Portland, Oregon, for Oregon Trial Lawyers Association, amicus curiae.

Robert J. Gregory, Attorney, Equal Employment Opportunity Commission, Washington, D.C., amicus curiae.

Douglas S. McDowell, Ann Elizabeth Reesman, McGuiness & Williams, Washington, D.C., Attorneys for Equal Employment Advisory Council, amicus curiae.

OPINION

TROTT, Circuit Judge:

Herman Schnidrig appeals the district court's grant of summary judgment in favor of Columbia Machine, Inc. ("Columbia") in Schnidrig's Age Discrimination in Employment Act ("ADEA") action alleging Columbia improperly denied him a promotion because of his age and constructively discharged him. We review the district court's grant of summary judgment de novo, *Jesinger v.*

Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994), and reverse.

I

FACTS AND PROCEDURAL HISTORY

Columbia is a closely held Washington Corporation owned by the Neth family. Fred Neth, Sr., is the majority shareholder, chairman of the Board of Directors, and chief executive officer of Columbia. The Board consisted of six directors: Fred Neth, Sr.; three of his children, Fred Neth Jr., Dorothy Osadchuk, and one other daughter; Bill Wells, a long time employee; and Joe Barclay, president of the Cascade Corporation.

Schnidrig, who was born in 1930, began working for Columbia as a production manager in 1980. In 1981, he was promoted to vice-president of manufacturing. In February of 1991, the president of the company, Tom Neth, resigned under pressure. Schnidrig was asked to take over the responsibilities of Tom Neth and run the company as general manager/vice-president of operations while the Board searched for a new president.

Schnidrig alleges, and we accept as true for purposes of summary judgment, that as early as June of 1991, Bill Wells told Schnidrig that during a Board of Directors meeting, Joe Barclay voiced the opinion that Columbia needed a president in the 45-50 year old range and that other directors agreed. In addition, the affidavit of Robert Showman, the manager of cost accounting, states that in the Fall of 1991, Bill Wells told him the Board was not considering Schnidrig because they wanted someone in

his or her mid to late forties. Schnidrig also presented the shorthand notes of the minutes of a Board meeting held on February 25, 1992. The notes indicate during discussion regarding the preparation of materials to be sent to the executive search firm, Joe Barclay stated "they should send a copy of job description, maximum compensation level, only perk, company car, age 45-50 years, and past experience with long-term potential." Bill Wells omitted the reference to an age requirement from the final draft of the minutes.

On February 12, 1992, Schnidrig sent a memo to Fred Neth, Sr. indicating he was interested in the president's position. Schnidrig alleges that on February 19, Fred Neth, Sr. told him Joe Barclay wanted a younger man for the job and that his daughters were leaning that way as well. Schnidrig also alleges that on February 27, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president.

In March of 1992, the Board hired Ronald Goerss of the recruiting firm Smith, Goerss, & Ferneborg, to conduct a nationwide search for a new president and to present candidates for the position to the Board. The Board agreed the president would be selected from the candidates submitted by Goerss. The Board gave Goerss a list of six minimum qualification requirements for the position. The list included four general requirements: 1) strong work ethic; 2) warm, friendly personality; 3) effective communication skills; and 4) team leadership. In addition, the list contained two specific requirements:

> (1) a minimum of 5 years broad general management experience and proven track record with a medium sized company or a division of a

larger firm engaged in the design, manufacture and sale of industrial machinery and equipment; and

(2) strong operations (manufacturing) background with a thorough working knowledge of accounting and financial reporting.

Goerss indicated he relied solely on the criteria given him by the Board and that he was never instructed to, nor did he consider age in making his decisions.

Schnidrig alleges that on May 8, he again asked Fred Neth, Sr. why he could not be president of Columbia and was again told the Board was looking for somebody younger.

In June of 1992, Goerss completed his search, including interviews of all three Columbia vice-presidents, and submitted a list of five candidates to the Board. All five candidates were from outside the company. The Board interviewed two of the five candidates and, in July, entered into negotiations with Gerald O'Meara to be the president of Columbia.

Also in July, Schnidrig again applied for the position of president and alleges he was again told the Board was looking for somebody younger in the 45-50 year old range. Thereafter, Schnidrig filed his first complaint with the EEOC. Schnidrig claims that from this point on his work environment deteriorated. Particularly, Schnidrig complains Robin Popple, another Columbia vice-president, was given a raise so that he earned more than Schnidrig; he was excluded from a lunch meeting with the officers of First Interstate Bank; company executives

and other personnel were instructed not to talk to Schnidrig about various matters including corporate finances; and he was moved out of his office and given a much smaller office.

On October 8, 1992, O'Meara accepted Columbia's offer and agreed to begin work on November 2, 1992. Schnidrig resigned on October 27, 1992.

Schnidrig filed suit against Columbia claiming that he was denied the promotion to president because of his age, and that he was constructively discharged in retaliation for filing a complaint with the EEOC. The district court granted summary judgment in favor of Columbia on all claims.

II

AGE DISCRIMINATION

The allocation of burdens and order of presentation of proof for claims of discrimination arising under the ADEA follow three steps:

> [A] plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1986)).

"The prima facie case may be based either on a presumption arising from the factors such as those set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973), or by more direct evidence of discriminatory intent." *Wallis*, 26 F.3d at 889 (citing *Lowe*, 775 F.2d at 1009). Furthermore, "[w]hen a plaintiff does not rely exclusively on the presumption but seeks to establish a prima facie case through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder." *Lowe*, 775 F.2d at 1009.

In this case, Schnidrig clearly established a prima facie case of age discrimination. Schnidrig did not attempt to establish the factors giving rise to a presumption of discrimination. Rather, Schnidrig offered direct evidence of discriminatory motives in the form of statements made by directors and notes taken during Board meetings.

Columbia argues that whether Schnidrig chooses to establish a prima facie case through a presumption or through direct evidence of discrimination, he must still show that he is qualified for the job. This argument is premature. Schnidrig established a prima facie case that he was treated differently on the basis of his age. Therefore, Schnidrig's qualifications are irrelevant to the existence of the prima facie case of discrimination. The burden shifts to Columbia to articulate nondiscriminatory motives regardless of Schnidrig's qualifications.

Columbia offered three nondiscriminatory reasons why it chose not to promote Schnidrig: 1) Schnidrig was eliminated as a candidate for the position by Goerss who did not include Schnidrig's name in the list of qualified candidates which he presented to the Board, therefore, it was not the Board's decision not to promote Schnidrig; 2) Schnidrig was not qualified for the job; and, 3) O'Meara was more qualified for the job than was Schnidrig.

The district court found that Columbia produced evidence to support its claim that O'Meara met the qualifications of the job profile and that Schnidrig did not. This was sufficient to shift the burden back to Schnidrig to show that Columbia's reasons for not promoting him were pretextual. Thus, the issue before this Court is whether Schnidrig produced sufficient evidence to raise a genuine issue of fact as to whether Columbia's proffered reasons were pretextual. "If a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate." *Wallis*, 26 F.3d at 889.

Schnidrig presented the following allegations and evidence to show discriminatory intent by Columbia: 1) Allegation that Bill Wells told Schnidrig that during a Board meeting in June of 1991, Joe Barclay expressed wanting a president in the 45-50 year old range; 2) Affidavit of Robert Showman, manager of cost accounting, stating that following a Board meeting in the fall of 1991, Bill Wells told Showman the Board was not seriously considering Schnidrig for president because they wanted someone in his or her mid to late forties; 3) Allegation that on February 19, 1992, Fred Neth, Sr. told Schnidrig

some of the directors wanted a younger man as president; 4) Shorthand notes of the minutes of the Board meeting on February 25, 1992, indicating Joe Barclay that the requirement of being 45-50 years old be included in the job profile for president; 5) Allegation that on February 27, 1992, Fred Neth, Sr. admitted the Board discussed wanting somebody younger as the new president; 6) Allegation that on May 8, 1992, Fred Neth, Sr. again told Schnidrig the Board wanted somebody younger; and 7) Allegation that in July of 1992, Fred Neth, Sr. again told Schnidrig the Board was looking for somebody younger to be president.

This Court has set a high standard for the granting of summary judgment in employment discrimination cases. Most recently, we explained that " '[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is one that can only be resolved through a "searching inquiry" – one that is most appropriately conducted by the factfinder, upon a full record.' " *Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994) (quoting *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991)).

> "[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision." . . . When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost

> always exist with respect to any claim of a non-discriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Sischo-Nownejad, 934 F.2d at 1111 (quoting *Lowe*, 775 F.2d at 1009). *Cf. Wallis*, 26 F.3d at 890 ("[W]hen evidence to refute defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption."); *FDIC v. Henderson*, 940 F.2d 465, 473 n. 16 (9th Cir. 1991) ("However, *Lowe* was subsequently amended to indicate that the Court did not mean to 'prevent the summary disposition of meritless suits but simply ensure that when a material fact exists a civil rights litigant will not be denied a trial on the merits.' ").

The district court, in granting summary judgment, emphasized that Schnidrig was eliminated as a candidate for president by Ronald Goerss of the executive search firm hired by Columbia and not by the Board. The district court found there was no evidence Goerss was ever told to consider age and that he never considered age in selecting candidates for the Board's consideration. The district court concluded the comments made by Fred Neth, Sr., were attenuated from the decision-making process, and therefore, were merely "stray remarks" with no connection to the employment decision.

The Ninth Circuit authority relied on by the district court is distinguishable. In *Merrick v. Farmers Ins. Group*, 892 F.2d 1434 (9th Cir. 1990), an executive for Farmers made one comment that he chose one candidate over

another because he was " 'a bright, intelligent, knowledgable young man.' " *Id.* at 1438. Similarly, in *Nesbitt v. Pepsico, Inc.* 994 F.2d 703 (9th Cir. 1993), a supervisor commented during a meeting that " '[w]e don't necessarily like grey hair.' " *Id.* at 705. The court found this "comment was uttered in an ambivalent manner and was not tied directly to Nesbitt's termination." *Id.*

Contrasting, in the instant case, Schnidrig alleges that on three separate occasions, when he asked to be considered for president, he was told the Board wanted somebody younger for the job. Significantly, at least one of these instances occurred after Goerss had submitted his list of candidates to the Board. Furthermore, Schnidrig did more than offer mere allegations of discriminatory intent; he produced evidence in the form of shorthand notes taken at the February 25, 1992, Board meeting and the affidavit of a coworker.

Although it is possible that Columbia sufficiently insulated the decision-making process from the discriminatory remarks of the directors, in light of the reluctance of this Circuit to allow summary judgment where there is direct or circumstantial evidence of discriminatory intent, the district court was premature in resolving this issue on summary judgment. Whether Columbia relied on impermissible factors in refusing to promote Schnidrig is a question appropriately answered by a trier of fact.

III

CONSTRUCTIVE DISCHARGE

Schnidrig also contends Columbia constructively discharged him by making working conditions so intolerable

that he felt forced to resign. Specifically, Schnidrig submitted six factors which, taken together, were designed to humiliate him and force him to resign: 1) He was replaced as head of the company by a man fifteen years younger than him; 2) Columbia did not give him a new position; 3) Another vice-president was given a pay raise so that he was earning more than Schnidrig; 4) He was forced to move out of his office and into a much smaller office; 5) He was excluded from a lunch meeting with officers from First Interstate Bank; and 6) Other executives were told not to speak to him about financial or other matters.

To establish a claim for constructive discharge, Schnidrig "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory working conditions.' " *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994) (quoting *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989)).

> Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. Thus, a plaintiff alleging a constructive discharge must show some aggravating factors, such as a continuous pattern of discriminatory treatment.

Sanchez v. City of Santa Ana, 915 F.2d 424, 431 (9th Cir. 1990) (internal quotations and citations omitted), *cert. denied*, 112 S.Ct. 66 (1991).

Schnidrig was not demoted, did not receive a cut in pay, was not encouraged to resign or retire, and was not disciplined. Accepting all of Schnidrig's allegations as true, his working conditions were not so intolerable and discriminatory that a reasonable person would feel forced to resign. Additionally, Columbia offered legitimate non-discriminatory reasons for each of the actions complained of by Schnidrig.

The district court correctly found no evidence to suggest either that any of these actions were motivated to force Schnidrig to resign or that they made Schnidrig's working conditions intolerable. Therefore, the district court's grant of summary judgment for Columbia on the claim of wrongful constructive discharge is affirmed.

IV

AFTER-ACQUIRED EVIDENCE

Columbia argues that even if this Court should find a genuine issue of material fact as to whether Schnidrig was denied the promotion for improper reasons, summary judgment is still appropriate because after Schnidrig resigned, Columbia discovered a legitimate nondiscriminatory reason for which Schnidrig would have been discharged. Columbia claims it later learned Schnidrig copied and removed confidential and personnel documents without authorization in violation of the terms of Columbia's employee handbook.

The Supreme Court recently held that the use of after-acquired evidence of wrongdoing by an employee that would have resulted in their termination as a bar to all relief for an employer's earlier act of discrimination is inconsistent with the purpose of the ADEA. *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995); *see also O'Day v. McDonnell Douglas Helicopter Co.*, ___F.3d___, ___ (9th Cir. 1996), No. 92-15625, slip op. filed March 26, 1996 ("[I]f an employer discharges an employee for a discriminatory reason, later-discovered evidence that the employee could have been discharged for a legitimate reason does not immunize the employer from liability."). Therefore, although Columbia's discovery of after-acquired evidence may bear upon the specific remedy to be ordered, it does not warrant the granting of summary judgment.

V

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of constructive discharge is affirmed. We reverse the district court's grant of summary judgment in favor of Columbia on Schnidrig's claim of age discrimination and remand that issue to the district court for a trial on the merits.

AFFIRMED in part; REVERSED and REMANDED in part.

Each party shall bear its own costs of this appeal.